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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:

**PETITION TO AMEND ARIZ. R.
SUP. CT., RULE 45**

Supreme Court No. R-14-0028

**Comment to Pending Petition to
Amend Ariz. R. Sup. Ct., Rule 45**

I wholeheartedly endorse James Mitchell's Petition proposing a simple disclaimer that per the Petition "would align claims for mandated CLE with available evidence of its value." As Mitchell incisively points out, there is no empirical data much less a causal relationship between attorney competence and mandatory continuing legal education (MCLE).

In 2010, the State Bar of Arizona missed the singular opportunity to study and to recommend the implementation of verifiable, valid, and reliable assessments of student learning when it charged an MCLE Task Force to "conduct a comprehensive review" of MCLE "to determine its effects on the legal profession." *State Bar of Arizona, MCLE Task Force Report Executive Summary*, available at http://www.azbar.org/media/297934/mcle_task_force_report_for_scope.pdf (last

visited May 19, 2015) Many years earlier, the American Bar Association took a pass on its own chance to organize "a study of mandatory CLE to determine whether it enhanced competence." Deborah L. Rhode and Lucy Buford Ricca, *Revisiting MCLE: Is Building Compulsory Passive Learning Better Lawyers?* 22 PROF. LAW. 2. 6 (ABA) (2014).

Sadly, not much has changed in the more than quarter-century that has passed since the Arden House III Report noted that MCLE could not assure attorney competence. Ralph G. Wellington, *MCLE: Does It Go Far Enough and What Are the Alternatives?*, in CLE AND THE LAWYER'S RESPONSIBILITIES IN AN EVOLVING PROFESSION: THE REPORT ON THE ARDEN HOUSE III CONFERENCE, NOVEMBER 13TH TO 16TH, 1987 359, at 363, 367-68 (ALI-ABA 1988)

It is much easier to count dollars than it is to count learning. And so while mandated continuing legal education continues as a multi-million dollar money maker, direct evidence of its educational quality and of student learning are harder to tally. And how infinitely more elusive such empirical assessments remain when no one is ever tasked with their determination.

Consequently, claims, whether puffery or not, that suggest a causal relationship between MCLE and competence or between MCLE and consumer

protection are destined to remain long on conclusion and short on evidence even as they continue to be cloaked with unfounded exaggeration.

Mere attendance at a class is meaningless without evidence-based metrics to measure the efficacy of delivering improved knowledge and skills acquisition. In the words of Marquette University Law School Professor Daniel Blinka who serves as current Chair of the Wisconsin Board of Bar Examiners, which regulates continuing legal education:

The principle behind CLE is sound: lawyers should stay abreast of legal developments. It's the execution that is often lacking. Lawyers are not required to take any particular type of course, except for the mandatory three credits of "ethics." Most salient, nothing requires that attendees be engaged in any manner. There are no quizzes and no tests; peppering the room with questions is unusual and likely unavailing. Although CLE regulations demand a qualified instructor who offers "helpful" written materials, there is no requirement that anyone pay attention to anything that is said. Thus, an attendee can while away the time checking e-mails, reading depositions, or just cruising the Internet. Only the attendees' sense of professionalism and the instructor's ability to draw attention command attention. In sum, CLE is too often a "butt-in-the-seat" exercise that demands only physical presence, not intellectual engagement.

Daniel D. Blinka, *Legal Education's Loss and the Problem with CLE*, available at <http://law.marquette.edu/facultyblog/2013/09/03/legal-educations-loss-and-the-problem-with-cle/> (last visited May 19, 2015)

Finally, as for the 'truth in advertising' component of the Petitioner's proposal, it is a fairly innocuous acknowledgement. And given the compulsory nature of continuing legal education for Arizona lawyers, the disclaimer does

nothing to impede or to interfere with the State Bar of Arizona's robust CLE revenue generation from its captive constituents.

Petitioner's proposal simply reiterates the material fact that empirical evidence is lacking that MCLE improves attorney competency or public protection. The proposal disclaims any such representations, whether express or implied. For this reason and for those stated above, I urge the Court to amend Rule 45 by adopting the proposed amendment.

Respectfully submitted this 19th day of May, 2015

By /s/ Mauricio R. Hernandez
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